Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970.

No. 737

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

AMERICAN CABLE SYSTEMS, INC.,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ROBERT E. WACHS,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.[1]

Petitioner's lengthy recitation of the case[2] is irrelevant to the narrow legal issue it seeks to present.[3] The Company conceded that it violated Sections 8(a)(1) and (3) of the Act, and the Board found that such violations justified the imposition of a bargaining order.

There are additional facts, however, which bear on the question of certiorari: four employees only were eligible to vote in the election (App. D, 40a); only three voted (App. D, 32a); on May 18, 1966, the Trial Examiner recommended that a new election be held (App. D, 21a); before the Board rendered its decision, all four employees and the one Company official who violated the Act, left the Company's employ;[4] on October 24, 1966, the Board directed the Company to bargain with the Union;[5] and from that time forward, the

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1. In accordance with this Court's Rules 24 and 40, there will be no counterstatement of the question; the Company will point out, however, that this is an inappropriate case in which to raise such question.

2. We do not agree with Petitioner's characterization of the facts. Nor does the Court of Appeals. But in view of the narrow legal issue presented, it is unnecessary to review or resolve the conflicts.

3. It is fair to surmise, therefore, that Petitioner unnecessarily belabored the facts in order to have this Court resolve a factual issue which has not yet been decided by the Court of Appeals. The Court of Appeals never reviewed the finding that the violations were sufficiently pervasive to justify the bargaining order; it refused to enforce the Board's supplemental order because of the Board's failure to consider, in this case, the effect of the complete turnover of employees and management official.

4. Company's August 26, 1969 Statement of Position, filed in connection with the remand proceeding.

5. All current employees were hired after the Board's decision. See footnote 4, *supra*.

Company sought to have a new election,[6] but the Board insisted steadfastly that a bargaining order must issue, and has sought such an order from the Court of Appeals on three separate occasions.

REASONS FOR DENYING THE WRIT.

I. Petitioner is concerned that if turnover of employees and offending company officials must be considered by the Board, it will encourage employer delay and additional litigation. This case is not the appropriate vehicle for the resolution of that question. It would be so only if the turnover question was raised *after* the Board had applied the *Gissel* standards,[8] for only if the turnover was raised thereafter could Petitioner argue that although true employee sentiment might disclose that a fair election could be held, administrative convenience requires the sacrifice of employee free choice and the imposition of a bargaining order.

In the present case, the turnover question was raised *before* the Board applied the *Gissel* standards. Thus, when such standards were considered, there would have been no administrative inconvenience to the Board, and no encouragement to the Company to delay or seek further litigation, had the effect of turnover been considered at that time.

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6. When enforcement first was sought in the Court of Appeals, the Company conceded there was sufficient evidence to find it had violated the Act, and that therefore a new election was appropriate.

7. There is a factual question which has not yet been resolved. See footnote 2, *supra*. It is unnecessary to resolve the Petition on that ground, however, particularly since the Company does not seek any further litigation in this case.

8. In *NLRB v. Gissel Packing Co.*, 395 U. S. 575 (1969), this Court required the Board, before issuing a bargaining order, to determine whether "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." (at p. 614-15).

The Court of Appeals made such a distinction, by distinguishing the present case from the usual situation:

> "In the instant case a different situation obtains. The Board's original findings were inadequate under the teachings of *Gissel* and the case had to be remanded to the Board for further findings. We think that on remand the Board shold have taken the opportunity to consider the then existing situation at American Cable to determine whether the electoral atmosphere was still so contaminated that a bargaining order was then justified." (App. A, 3a)

Thus, in the normal case, the electoral climate will be considered when the Trial Examiner hears the case—ordinarily within a few months of the election—whereas the Board first considered it in this case almost 5 years after the election, and 4 years after the complete turnover had occurred. Accordingly, the present case is one of very limited application, involving *Gissel* remands only, and does not require a review of the broad conceptual problem posed by the Petition.

II. Were it assumed, arguendo, that the present case did involve the broad issue, certiorari has been sought for its review in *NLRB v. Clark's Gamble Corp.*, No. 265, 1970 Term, where the "Question Presented" is:

> "Whether enforcement may be refused to an otherwise appropriate bargaining order of the National Labor Relations Board on the ground that the union in whose favor the order ran may have lost its majority status through employee turnover during the period following the commission of the employer's unfair labor practices."

Thus, even if certiorari is deemed appropriate to review such an issue, it need not be granted in this case, particularly where only four employees and one company official were involved, none of whom has been employed by the company for more than four years, on whose behalf the Board has taken this case to the Court of Appeals on three separate occasions.

CONCLUSION.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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